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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the Constitution deprives this Court of judicial power to require retroactive monetary relief in the form of tax refunds payable from a state treasury.

2. Whether the Commerce Clause may be judicially enforced by requiring a state to reimburse taxpayers for payments made under a state tax statute found to violate that constitutional provision.

3. Whether this Court's decision in *American Trucking Associations* v. *Scheiner*, 107 S.Ct. 2829 (1987), should be applied prospectively so that taxpayers are not entitled to recover refunds of highway taxes collected under a state law later declared to have been invalid in light of *Scheiner*, including the taxes collected after the date of the *Scheiner* decision.

4. Whether petitioners are entitled to refunds of HUE taxes paid between June 23, 1987, when *Scheiner* was announced, and August 14, 1987, when Circuit Justice Blackmun issued an escrow order.

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Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821)	18, 19
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Consolidated Freightways Corp. v. *Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984)	25
County of Lincoln v. *Luning*, 133 U.S. 529 (1890)	22
County of Searcy v. *Stephenson*, 244 Ark. 54, 424 S.W.2d 369 (1968)	14

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Edelman v. *Jordan*, 415 U.S. 651 (1974)	*passim*
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Great Northern Ry. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)	24
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Hellerstein v. *Assessor of Town of Islip*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975), *modified*, 39 N.Y.2d 920, 352 NE.2d 593, 386 N.Y.S.2d 406 (1976)	44
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Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	21

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Maryland v. *Louisiana*, 451 U.S. 725 (1981)	27
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Poindexter v. *Greenhow*, 114 U.S. 270 (1885)	20
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Raymond Motor Transp., Inc. v. *Rice*, 434 U.S. 429 (1978)	25
Rothstein v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973)	22
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Summa Corp. v. *California ex rel. State Lands Commission*, 466 U.S. 198 (1984)	19
Thomas v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981)	20

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Thompson v. *Continental Southern Lines, Inc.*, 222 Ark. 108, 257 S.W.2d 375 (1953)	14
Tyler Pipe Industries v. *Washington State Department of Revenue*, 107 S.Ct. 2810 (1987)	24, 32
United States v. *Johnson*, 457 U.S. 537 (1982)	24
United States v. *Mississippi*, 380 U.S. 128 (1965)	23
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Watson v. *Dodge*, 187 Ark. 1055, 63 S.W.2d 993 (1933)	15
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White Mountain Apache Tribe v. *Williams*, 810 F.2d 844 (9th Cir.), *cert. denied*, 479 U.S. 1060, *reh. denied*, 480 U.S. 941 (1987)	25
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FEDERAL CONSTITUTION, STATUTES, AND RULES:

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U.S. Const. art. III, § 2	1
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49 U.S.C. § 10521(b)(4)	26
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Ark. Code Ann. § 27-35-204 (Supp. 1987)	2, 7, 43
Ark. Code Ann. § 27-35-205 (1987)	*passim*
Ark. Code Ann. § 27-35-205 (Supp. 1987)	2, 7
Ark. Code Ann. § 27-35-205(b)(1) (Supp. 1987)	42
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Ark. Stat. Ann. § 75-817.4-75-817.6 (Supp. 1985)	8

LEGISLATIVE MATERIALS:

H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 45 (1980)	26
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Oversight of the Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 98th Cong., 1st Sess. (1983)	44
Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 94th Cong., 2d Sess. (1984)	44

MISCELLANEOUS:

D. Currie, *The Constitution in the Supreme Court, The First Hundred Years 1789-1888* (1985)	19
Field, *The Recovery of Illegal and Unconstitutional Taxes*, 45 Harv. L. Rev. 501 (1932)	15
Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138 (1988)	32
C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972)	18
R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* (4th ed. 1984)	40, 41

Table of Authorities Continued

	Page
Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413 (1975)	15
Schaefer, *Prospective Rulings: Two Perspectives*, 1982 Sup. Ct. Rev. 1 (1983)	26
Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103 (1987)	28
1 C. Warren, *The Supreme Court in United States History* (1922)	17

No. 88-325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writ Of Certiorari To The Arkansas Supreme Court

BRIEF FOR RESPONDENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, clause 3, of the Constitution provides:

> The Congress shall have power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes;

Article III, § 1, of the Constitution provides in relevant part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Article III, § 2, of the Constitution provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the

United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * *

The Eleventh Amendment to the Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Arkansas Constitution, Article V, Section 20, provides:

The State of Arkansas shall never be made defendant in any of her courts.

The Arkansas Highway Use Equalization Tax, 1983 Ark. Acts, No. 685, Ark. Code Ann. §§ 27-35-204, 27-35-205 (1987)(formerly codified as Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (Supp. 1985)) and the Arkansas statute replacing it, 1987 Ark. Acts, No. 3 (2d Ex. Sess.), Ark. Code Ann. §§ 27-35-204, 27-35-205 (Supp. 1987), are reprinted in Appendices B and D, respectively, to respondents' Reply Brief to Petition for a Writ of Certiorari.

STATEMENT

Section 127 of the Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2097, 2123, required that states permit motor carriers with a gross weight up to 80,000 pounds

to travel their highways in order to receive their apportioned share of federal funds under the Federal-Aid Highway Act of 1956, Ch. 462, 70 Stat. 374. Faced with this threatened loss, Arkansas raised its weight limit from 73,280 pounds to the federally-mandated 80,000 pounds and enacted a revenue measure in order to compensate the state for the increased costs associated with having such heavy vehicles on its highways.

The Arkansas Highway Use Equalization Tax ("HUE"), 1983 Ark. Acts, No. 685, Ark. Code Ann. §§ 27-35-204, 27-35-205 (1987)(formerly codified as Ark. Stat. Ann. §§ 75-817.2, 75-817.3 (1985 Supp.)), which became effective July 1, 1983, provided that trucks with a gross weight of more than 73,280 pounds, in order to travel within the state, were required to satisfy the HUE tax in one of three ways: payment of a yearly fee of $175; payment of $.05 per mile traveled in Arkansas; or payment of $8.00 for a trip pass entitling the truck to travel 100 miles within the state.

Empty trucks capable of carrying such heavy loads weigh between 29,000 and 31,000 pounds. R. 2308. By raising its weight limits, Arkansas provided operational savings to carriers using such trucks of more than $115 million per year. J. App. 152. Carrying heavy loads was more profitable and trucks weighing more than 73,280 pounds no longer had to circumnavigate the state in order to realize those profits. *Id.* At the same time heavy trucks cause considerable damage to state highway systems and require additional construction, maintenance and repair of highways and bridges.[1] In Arkansas, it was

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[1] Part of Arkansas' increased cost of maintaining highways with heavier weight vehicles is simply a matter of geography. In testimony before the Senate Committee on Commerce, Science and Transportation as part of the Committee's ongoing hearings on regulation of the motor carrier industry, the Executive Director of the American Association of State Highway and Transportation Officials testified that "in the Mississippi Valley area, where you have heavier soils, clays that become very soft under rain . . . [t]he cost to maintain the highway is much higher for these States with heavier axle weights. And that is the reason why some States . . . have tried to maintain lower weight limits. They have a natural problem not of their mak-

estimated that raising the weight limit to 80,000 pounds would cost the state $53 million a year. J. App. 5, 38.

Between July 1, 1983, and October 9, 1987, when the HUE tax was repealed, the tax raised approximately $26 million annually. By August 17, 1987, a total of approximately $122 million in HUE tax revenues had been collected and expended.[2] These revenues were, by statute, dedicated to the state's highway system and deposited into the state treasury on the last day of each month. Ark. Code Ann. § 27-35-205(m) (1987).

Petitioners consist of two certified classes: Arkansas "base registered" carriers whose vehicles were subject to the HUE tax; and carriers "base registered" outside of Arkansas whose vehicles were subject to the HUE tax. J. App. 23. Under the International Registration Plan ("IRP"), of which Arkansas is a member, carriers register their vehicles in order to qualify for apportioned registration fees in the member states. Vehicles that meet the test for base registration are engaged in interstate transportation. J. App. 78. Under the IRP, a carrier has the option of base registering its vehicles in any state so long as it maintains an office there. J. App. 79-81. There is accordingly no necessary relationship between corporate domicile, principal place of business and place of IRP base registration. *Id.* Indeed, some Arkansas base registered petitioners are companies headquartered outside Arkansas. R. 2128-2129.

Petitioners brought this action in 1983 in the Chancery Court of Pulaski County, Arkansas, against the commissioners

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ing." *Hearings on Economic Regulation of the Trucking Industry and S. 1400 before the Senate Committee on Commerce, Science and Transportation*, 96th Cong., 2d Sess. 866 (1979).

[2] Total HUE tax collections through October 9, 1987, when the statute was repealed, were $126.6 million. These figures are taken from the internal records of the state highway department and are set forth in Appendix C to respondents' Reply Brief to the Petition for a Writ of Certiorari ("Rep. Br. App."). The Arkansas Supreme Court's statement that a total of $159 million "was collected and funneled to the state treasury" prior to August 17, 1987 (Pet. App. 3a) apparently is an arithmetic error.

of the Arkansas State Highway Commission, two employees of the Arkansas Highway and Transportation Department, the State Treasurer, the State Commissioner of Revenues, and the Director of the Arkansas Department of Finance and Administration. J. App. 6. Claiming, *inter alia*, that the HUE tax violated the Commerce Clause of the United States Constitution, petitioners sought preliminary and permanent injunctive relief against the deposit of any HUE tax proceeds into the state treasury, a declaratory judgment that the tax was unconstitutional, and a refund of all HUE taxes paid. J. App. 17-19.

On June 1, 1983, by agreement of the parties, the court entered an order placing all HUE tax revenues in escrow. R. 71-72. After an evidentiary hearing showing that the state highway system incurred additional costs of $53 million per year from trucks subject to the HUE tax, the court determined that petitioners had not shown a likelihood of prevailing on the merits and entered an order denying a preliminary injunction unless petitioners posted a bond in the amount of $53 million. Pet. App. 40a-41a. Petitioners had argued that they were entitled to a preliminary injunction because "they will have no remedy at law to recover the questioned tax, once it is deposited by Defendant Fisher to the funds of the State of Arkansas." *See* note 4 *infra*.

Upon petitioners' failure to post a bond, the escrow was dissolved on July 29, 1983. Pet. App. 40a. The Arkansas Supreme Court affirmed the denial of a preliminary injunction without bond, agreeing that the HUE tax would withstand constitutional attack. Pet. App. 40a-41a. After further proceedings, the Chancery Court upheld the tax and the Arkansas Supreme Court affirmed. Pet. App. 17a.[3] The Arkansas

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[3] Petitioners introduced a survey showing that there was a 3-1 disparity in average cost per mile of HUE taxes between non-Arkansas base registered trucks and Arkansas base registered trucks. Pet. App. 11a. (Those responding to the survey were interstate carriers (R. 1940); the record does not show any wholly intrastate carrier having responded.) The disparity arose because these trucks traveled different numbers of miles in Arkansas. The survey was not the

Supreme Court ruled that the HUE tax was "a user fee, passed by the Legislature to compensate the state for the wear and tear on its highways caused by trucks carrying the higher weights" and was valid under the Commerce Clause in light of this Court's rulings in *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285 (1935); and other cases. Pet. App. 20a-24a, 31a.

On appeal, this Court vacated the judgment of the Arkansas Supreme Court and remanded for "further consideration in light of *American Trucking Associations* v. *Scheiner*, 107 S.Ct. 2829 (1987)." Pet. App. 16a. Circuit Justice Blackmun granted petitioners' motion for immediate issuance of the mandate, and the Court's mandate issued on July 16, 1987. Pet. App. 10a. On remand, the Arkansas Supreme Court denied petitioners' motions for an immediate remand to the Chancery Court and for temporary relief in the form of an escrow pending its decision on the merits. Pet. App. 14a-15a.

On August 14, 1987, while the Arkansas Supreme Court was in summer recess, Circuit Justice Blackmun ordered an immediate escrow of HUE tax proceeds pending the Arkansas Supreme Court's further consideration of the case in light of *Scheiner*. Pet. App. 9a (*American Trucking Associations* v. *Gray*, 108 S.Ct. 2 (1987)). Circuit Justice Blackmun determined that petitioners had shown a likelihood of success on the merits because there "is a significant possibility that the Arkansas courts will declare the HUE tax unconstitutional under the

subject of findings of fact and it does not cover tax years after 1983. Even if the survey were accepted, it is not known whether non-Arkansas base registered trucks traveled fewer miles in the state than their Arkansas based counterparts from 1983 to 1987 and therefore paid more per mile in HUE taxes. (In *Scheiner*, trucks subject to the axle taxes and base registered in Pennsylvania traveled the same number of miles in the state as trucks base registered outside the state. 107 S.Ct. at 2836.) As we later discuss (notes 32,33 *infra*), petitioners' survey did not in any event show a disparity between interstate and intrastate commerce.

'internal consistency' test pronounced by this Court in *Scheiner*." Pet. App. 12a. Circuit Justice Blackmun also found that petitioners would suffer irreparable injury unless an escrow were ordered. He noted that the state officials had asserted sovereign immunity as a bar to tax refunds and that accordingly "there is a substantial risk that [petitioners] will not be able to obtain a refund if the tax ultimately is declared unconstitutional." *Id.*

On October 9, 1987, the Arkansas legislature, meeting in special session, repealed the HUE tax (1987 Ark. Acts, No. 3, § 11 (Second Ex. Sess.)) and replaced it with a tax requiring carriers to pay $.025 per mile for trucks weighing more than 73,280 pounds. 1987 Ark. Acts, No. 3 (Second Ex. Sess.), Ark. Code Ann. §§ 27-35-204, 27-35-205 (Supp. 1987).

The Arkansas Supreme Court subsequently ruled that although the HUE tax had been unconstitutional in view of *Scheiner*, petitioners were not entitled to refunds of the taxes collected under the statute and expended on the state highway system prior to August 14, 1987. Pet. App. 3a. Unlike the $4.9 million collected between August 14, 1987, and October 9, 1987, and held in escrow pursuant to Circuit Justice Blackmun's order—which the Arkansas Supreme Court ordered refunded to petitioners—these tax proceeds had been "paid into the state treasury." Pet. App. 4a. Rejecting petitioners' argument that *Scheiner* should be applied retroactively so as to entitle them to this relief, the Arkansas court ruled that granting refunds "would allow them an unconscionable windfall" and would constitute unfair treatment of the Arkansas base registered truckers who had relinquished any refund claims. Pet. App. 5a. With respect to the escrowed funds, however, these had "not been placed in the state treasury and spent or, presumably, counted on for the future." *Id.*

On remand, the Arkansas Supreme Court had allowed the Arkansas Poultry Association to intervene. These interstate carriers, who were members of the Arkansas base registered class of petitioners, opposed granting tax refunds because the payment of such a large sum would bring chaos in the administration and maintenance of the state's highway program.

Brief for Intervenors, at 11-12. They did not object to a payment of refunds from the escrowed funds since state sovereign immunity applied only when the refunds had been deposited in the state treasury. Brief for Intervenors, at 8 n.2. After the Arkansas Supreme Court's decision, another member of the Arkansas base registered class engaged in interstate transportation—Leon Cawood, a named plaintiff and a petitioner here (Pet. ii)—filed a "Separate Petition for Rehearing" claiming that he was the proper class representative. Although Cawood did not seek HUE tax refunds, he argued that the state should reimburse Arkansas based truckers for all retaliatory taxes they paid to other states. (The Arkansas legislature, in 1985, had passed a statute allowing such reimbursement. Ark. Stat. Ann. §§ 75-817.4—75-817.6 (Supp. 1985).)

Still another group (Owner-Operators Independent Drivers Association Inc.), representing 8000 owner-operators, moved to intervene and filed extensive affidavits showing that petitioners as carriers had passed through the HUE taxes to them, and arguing that if petitioners were awarded refunds they would be receiving a windfall. *See* Motion of Owner-Operators Independent Drivers Association of America to Intervene and for Certification of a Subclass. The Arkansas Supreme Court denied the motion without opinion.

After the Arkansas Supreme Court rendered its decision, the American Trucking Associations, Inc., on behalf of itself and other petitioners, filed a petition for rehearing suggesting that if full refunds would not be granted, the Arkansas court should exercise its equitable powers and award them partial refunds. The Arkansas Supreme Court denied the petition for rehearing on April 25, 1988, without opinion. Pet. App. 7a.

SUMMARY OF ARGUMENT

1. The Eleventh Amendment precludes petitioners from satisfying their demand for tax refunds through this Court. The Eleventh Amendment prevents the federal judiciary from imposing monetary burdens on states for past actions. The Amendment therefore bars the lower federal courts from ordering such retroactive monetary relief. Since the Eleventh

Amendment limits the judicial power of the United States, its restrictions also apply to this Court.

No exception was made in the Eleventh Amendment for that portion of the judicial power constituting the Court's appellate jurisdiction and none could have been intended. The Eleventh Amendment limits the Court's power regardless whether the case was brought originally in federal or state court. A suit commenced in a state court remains a suit against a state to which the federal judicial power does not extend when it reaches this Court.

The Eleventh Amendment's bar against retroactive monetary relief, as applied to this Court in state court cases, no more threatens the supremacy of federal law than does the same bar in the lower federal courts. The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), permits the lower federal courts to grant prospective relief against state officials. The Court long ago created a similar exception to the Eleventh Amendment for cases on review of state court judgments. This exception for prospective relief rests on the need to ensure uniformity and supremacy of federal law.

As a result, whether the judicial power is restricted by the Eleventh Amendment depends on the effect of the relief. Measured by that standard, petitioners' claim that this Court should reverse the Arkansas Supreme Court's decision denying them tax refunds runs afoul of the Eleventh Amendment's limitation on the judicial power of the United States. Tax refunds payable from the state's treasury for action in the past do not constitute prospective relief.

2. While petitioners seek to establish that *Scheiner* should be applied retroactively, they ignore the critical subsidiary question whether, under the Commerce Clause, refunds may be recovered for taxes paid under a state law that violates the negative implications of that constitutional provision. That question is essentially one of remedy and cannot be answered in terms of retroactivity analysis. When state law precludes recovery of tax refunds, and there is no federal statute on point, only the Constitution can be invoked to supersede state law and

provide such relief. But the rules of retroactivity are not derived from the Constitution.

The Commerce Clause itself does not support the remedy of tax refunds. By its terms, the Clause confers no rights of any sort on petitioners. It grants power to Congress to regulate commerce among the states. When the Court enforces the Commerce Clause on the basis of its negative implications, the Court allocates power between the federal and state governments by determining what is forbidden to the states until Congress acts. If the Court went further and created a national rule of tax refunds, inconsistent with the various laws of the states, the Court would be enforcing the Commerce Clause in a manner at odds with Congress' regulatory role under that constitutional provision. Legislation is almost invariably forward looking. When Congress has rendered certain state tax laws invalid as burdens on interstate commerce, it has legislated prospectively, without seeking to require the states to pay refunds for taxes collected in the past. Congress, as a representative body, is sensitive to the states' financial concerns and knows that an award of tax refunds would have to be satisfied out of current revenues, on which the states depend for their day to day operations. If the courts were to require such awards, the results would be ironic. In Arkansas, highway taxes would have to be raised dramatically in order to pay petitioners. In the name of removing a burden on interstate commerce, the Court would therefore be forcing the state to create a burden on interstate commerce in the form of higher taxes on the interstate carriers who travel its highways. Congress itself has not regulated commerce among the states in this manner and unless and until Congress does so, the matter of tax refunds is committed to state law.

3(a). There is nothing to petitioners' argument that *Scheiner* did not constitute a clear break in the law under the first criterion in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), for determining whether to give a decision prospective only effect. *Scheiner* overruled not one, but many of this Court's earlier decisions upholding flat highway taxes (the *Aero Mayflower* line of cases). *Scheiner*, moreover, did so on the basis of

the internal consistency test, a new Commerce Clause doctrine.

The proper inquiry is not, as petitioners contend, whether the Court's overruling of the *Aero Mayflower* line of cases was foreshadowed. A clear break occurs, *Chevron* held, if the Court overrules a clear precedent or announces a new legal principle not clearly foreshadowed. The Court has already rejected petitioners' attempted reformulation of this test. *Solem v. Stumes*, 465 U.S. 638, 646 n.6 (1984), held that even if a decision that overrules precedent was foreshadowed, the authorities were entitled to rely on existing law.

In any event, *Scheiner* was not a decision the Arkansas legislature should have or could have prognosticated when it passed the HUE tax in 1983. *Scheiner* was a five-to-four decision, the majority opinion describes the case as a difficult one and decisions rendered before *Scheiner* had cited the *Aero Mayflower* line of cases with approval. This Court retains the exclusive privilege of overruling its decisions and state legislatures are entitled to rely on them.

(b). An award of tax refunds will not further the purpose of *Scheiner*'s internal consistency test to remove *potential* threats to the flow of interstate commerce. The HUE tax, through its repeal, poses no such threat. It is likewise clear that the tax did not deter interstate commerce in the past. The fact that petitioners saved $115 million a year by driving their heavy trucks through Arkansas while paying $26 million per year in HUE taxes demonstrates as much. Petitioners' further argument that the purposes of *Scheiner* would be served by using tax refunds as a sanction against the Arkansas legislature and courts is preposterous. The Arkansas legislature acted responsibly in enacting the tax and in repealing it. The Arkansas courts did not thwart or fail to comply with this Court's decisions.

(c). The balance of equities is strongly in favor of the state. Both certified classes of petitioners—those base registered in Arkansas and those base registered elsewhere—were engaged in interstate transportation. Yet when petitioners claim a dis-

parity in treatment, they point to differences in average costs per mile in HUE taxes between Arkansas based and non-Arkansas based carriers—that is, differences among themselves. Their grievance is that some interstate carriers paid too much per mile in HUE taxes, which necessarily means that some interstate carriers paid too little. What petitioners seek through tax refunds is thus a readjustment among themselves, financed through the Arkansas treasury, when the total tax burden on interstate commerce was not itself excessive and when the proceeds of the tax were expended for the benefit of all petitioners. Moreover, the Arkansas law allowing heavy trucks required payment of both registration fees and HUE taxes and the record confirms that when both are considered, the average disparity shrinks considerably.

During the years in question petitioners not only received the benefit of the state's highway program, but also realized operational savings of $115 million annually by being able to travel Arkansas' highways with their heavily loaded trucks. While petitioners were reaping this benefit they were imposing on the state $53 million dollars in costs for highway construction and repair each year. At the same time, petitioners admitted that at least some of them could and would pass their HUE taxes on to their customers; and the owner-operators who leased their equipment and services to petitioners claimed that they, not petitioners, actually wound up paying the taxes.

The administrative burdens associated with evaluating the economic incidence of the HUE taxes, the actual cost per mile in HUE taxes with respect to hundreds of thousands of trucks, the offsetting costs per mile to carriers in registration fees, and the qualification of any particular carrier for refunds would be enormous. Assuming these obstacles are surmountable, petitioners suggest that there should be a dramatic increase in Arkansas' highway taxes in order to create an excess fund from which to pay them tax refunds. But that itself would inflict a severe burden on interstate commerce. Before such a measure could be adopted, the potential effects of such a tax increase on the Arkansas economy would have to be assessed. Yet that is solely a legislative function.

4. Several days after deciding *Scheiner* on June 23, 1987, this Court vacated and remanded the Arkansas Supreme Court's

judgment upholding the HUE tax for further consideration in light of *Scheiner*. At the time, the Arkansas legislature was not in session, the Arkansas Supreme Court was about to recess for the summer, the new HUE tax year was to begin in only a few days, and tens of thousands of trucks were about to qualify to travel the state's highways with heavy loads by paying the tax for the July 1, 1987—June 30, 1988, tax year. If the HUE tax became unenforceable the moment *Scheiner* was decided, trucks weighing more than 73,280 pounds would have been forbidden to operate in Arkansas. Yet there had been no decision on the merits regarding whether *Scheiner* doomed the HUE tax and in the Arkansas courts petitioners had rested their constitutional arguments on a factual basis that had yet to be tested.

In these circumstances, the Court's decision not to reverse but instead to vacate and remand for reconsideration not only meant that the HUE tax remained in effect, but also accorded the Arkansas legislature time to determine whether to revise the HUE tax in view of *Scheiner* or to enact a new tax statute if necessary, as it did in October. In such circumstances this Court has given Congress a reasonable time to make legislative changes taking account of its decisions and there is no reason why the Arkansas legislature should be treated any differently. State courts too have recognized that midstream changes in a state's tax system in order to accommodate judicial decisions can cause administrative difficulties and fiscal disruption. In order to minimize such problems, the effective date of decisions has been stayed while the legislature enacts replacement legislation. Accordingly, HUE taxes collected for the several weeks after *Scheiner* came down and before Circuit Justice Blackmun's order should not be refunded. To do so would give petitioners a free ride during that period, a period in which the HUE tax remained in effect.

ARGUMENT

I. THE ELEVENTH AMENDMENT DEPRIVES THIS COURT OF JUDICIAL POWER TO REQUIRE RETROACTIVE MONETARY RELIEF

Refunds of all or any portion of the $122 million collected in HUE taxes would have to be paid out of the treasury of Arkan-

sas using the state's current operating revenues. Under state law, sovereign immunity would bar such relief, and the Arkansas Supreme Court has already ruled that petitioners are not entitled to refunds.[4] In this Court, the Eleventh Amendment

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[4] Petitioners admitted as much. *Brief in Support of Motion for Temporary Restraining Order/Preliminary Injunction*, at 1, Chancery Court of Pulaski County, Arkansas, No. 83-2360, May 27, 1983 ("The most harmful result to Plaintiffs and the members of the similarly situated class if they fail to obtain injunctive relief will be the fact that they will have no remedy at law to recover the questioned tax, once it is deposited by Defendant Fisher to the funds of the State of Arkansas."). R. 964.

Respondents have maintained from the outset that petitioners' claim for tax refunds was barred by state sovereign immunity. *See, e.g., Response to Plaintiffs' Motion for Reconsideration*, at 5-6, Chancery Court of Pulaski County, Arkansas, No. 83-2360, Aug. 17, 1983. No decision in Arkansas history has awarded tax refunds against the state after the proceeds have been deposited in the state treasury. R. 875-76.

In general, Arkansas follows the common law rule barring the recovery of taxes paid voluntarily under a statute later declared invalid. *See County of Searcy* v. *Stephenson*, 244 Ark. 54, 424 S.W.2d 369 (1968); *Thompson* v. *Continental Southern Lines, Inc.*, 222 Ark. 108, 257 S.W.2d 375, 379 (1953). While the common law rule has been applied to city and county taxes (*see City of Little Rock* v. *Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982)), state taxes are another matter.

The Arkansas Constitution provides that the state may not be sued in its own courts (Ark. Const., Art. 5, § 20), and common law cannot, of course, supersede the state Constitution. Ark. Code. Ann. § 1-2-119 (1987); *Parker* v. *Arkansas Real Estate Comm'n*, 256 Ark. 149, 506 S.W.2d 125, 127 (1974). State officers may, however, be sued for declaratory and injunctive relief under Article 16, § 13 of the Arkansas Constitution, which permits suits against officials to prevent illegal exactions. *See Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). In such actions, however, the state will nevertheless be considered the real party in interest when refunds would have to be paid from the state treasury; on the other hand, if "at no time the [tax proceeds] were mingled with or became a part of the funds of the State" — as, for example, when an escrow order is in effect—"under such circumstances the suit is not against the State"

precludes petitioners' claim.

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The history of the Eleventh Amendment shows that one of its primary purposes was "to prohibit the [federal] courts from imposing monetary burdens on the states for past actions. If courts could impose liability retroactively, state fiscal policy would be seriously upset. A state would have to appropriate additional funds to pay for liabilities incurred in prior fiscal years when it was unaware of the need for such an allocation." Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1444 (1975).

Recognizing this core function of the Eleventh Amendment, the Court has held that the Eleventh Amendment bars federal courts from ordering tax refunds in cases brought against state

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and recovery may be had. *McCain* v. *Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114, 121 (1943). "According to this view the courts can not by judgment or decree order the payment of money from the treasury." Field, *The Recovery of Illegal and Unconstitutional Taxes*, 45 Harv. L. Rev. 501, 513 (1932). *See also Watson v. Dodge*, 187 Ark. 1055, 63 S.W.2d 993, 995 (1933) (relying, by analogy, on decisions of this Court under the Eleventh Amendment in order to determine whether a suit against an officer should be considered as one against the state).

At all events, Arkansas has not expressly waived its Eleventh Amendment protection. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985) (to constitute a waiver, "a state statute or constitutional provision . . . must specify the State's intention to subject itself to suit in *federal court*") (emphasis in original).

officials.[5] "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. at 464.

Recent decisions of this Court have reinforced the rule that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974). *See Atascadero State Hospital* v. *Scanlon*, 473 U.S. at 238 (1985); *Green* v. *Mansour*, 474 U.S. 64, 68-69 (1985). Although the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), permits federal courts to issue injunctions against state officers (but not the state itself) despite the Eleventh Amendment, retroactive monetary awards do not come within the *Ex Parte Young* exception. "The distinction between that relief permissible under the doctrine of *Ex Parte Young* and that found barred in *Edelman* was the difference between prospective relief on the one hand and retrospective relief on the other." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Thus, "[r]elief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986).

As the decisions discussed above demonstrate, the Eleventh Amendment would bar the lower federal courts from granting the tax refunds petitioners seek in this case. Because the Eleventh Amendment applies to all federal courts, this Court

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[5] In *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), a non-resident company sued the state treasury department in federal court for a refund of income taxes collected under a state statute that allegedly violated the Commerce Clause and the Fourteenth Amendment. The Court held that the Eleventh Amendment's "express constitutional limitation" on federal judicial power foreclosed any such relief. 323 U.S. at 464. *Accord Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944).

cannot require any greater relief from the state. By its terms, the Amendment constitutes a restriction on the "Judicial power of the United States" regardless of which federal court seeks to exercise it. That the Amendment was intended to limit this Court is apparent not only from its language but also its history. The Eleventh Amendment was adopted in response to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), a Supreme Court decision viewed as a direct and substantial threat to the financial security of the states. *See, e. g., Monaco* v. *Mississippi*, 292 U.S. 313, 325 (1934).

It is equally clear that the Eleventh Amendment applies when this Court reviews state court judgments. There is no reason to suppose that the Amendment's limitation on this Court's power relates only to cases within its original jurisdiction. *Chisholm* was such a case, but the resulting text of the Amendment broadly circumscribes the federal judicial power vested in the Supreme Court and in the lower federal courts under Article III. The Eleventh Amendment contains no exception for the Court's appellate jurisdiction and none could have been intended. The public outcry that greeted *Chisholm* v. *Georgia* would have been no less intense—and perhaps even more so—if the Court had subjected the state to liability by reversing a state court decision upholding the state's sovereign immunity. *See Edelman v. Jordan*, 415 U.S. at 662; 1 C. Warren, *The Supreme Court in United States History* 96-102 (1922).[6]

Other language in the Eleventh Amendment further demonstrates that it applies not only to cases brought originally in a federal court but also to cases heard by this Court on appeal.[7]

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[6] Section 25 of the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85, gave the Supreme Court appellate jurisdiction over state court decisions denying a right claimed under the Constitution. *See Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

[7] Justice Brennan so argued in his dissenting opinion in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. at 294 ("nothing in the text or subsequent interpretations of Article III suggests that the federal judicial power extends more broadly to hear appeals than to decide

The Amendment covers "any suit, in law or equity, commenced or prosecuted" against a state. The scope of the Eleventh Amendment's reach is thus defined at the outset of litigation, regardless whether the action begins in a state or federal court. That is, whenever a suit is "commenced" by a citizen against a state, the Eleventh Amendment forbids the federal judicial power from acting in that case. The action does not lose its character as a suit commenced against a state when it reaches this Court on appeal or certiorari because, as the Court held in *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821), that is merely a continuation of the original suit.[8] Thus,

original cases").

Justice Brennan further argued that the Eleventh Amendment does not apply to federal question cases. 473 U.S. at 258-99. *But see* C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 94 (1972), discussing the historical evidence and concluding that the Amendment "was intended to preclude all suits against a state by citizens of other states and aliens—even where the asserted claim sounded in the Constitution or federal law . . . ."

[8] In *Cohens*, Chief Justice Marshall concluded that "[t]o commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand," 19 U.S. (6 Wheat.) at 408, which is what petitioners are doing here.

Cohens does not hold that the Eleventh Amendment is inapplicable to the Supreme Court's appellate jurisdiction. The Cohens were *defendants* in a state criminal action. Upon their conviction, they took their case to the Supreme Court by writ of error, claiming that the state law violated the Constitution. Virginia argued that the writ of error constituted a "suit . . . commenced" against the state by a citizen within the meaning of the Eleventh Amendment. The Court rejected this argument on the ground that the writ of error was not a new suit and that the case on appeal was merely a continuation of the original action, which the state had "commenced" against the Cohens. 19 U.S. (6 Wheat.) at 409. *See Welch* v. *Texas Dept. of Hwys. and Transp.* 107 S.Ct. 2941, 2950 n.11 (1987)(plurality opinion); *Monaco v. Mississippi*, 292 U.S. at 327; *Hans* v. *Louisiana*, 134 U.S. 1, 19 (1890).

In so holding, Chief Justice Marshall distinguished *Cohens* from cases—such as this—where an individual sues a state and then seeks

as Professor Currie has written, the Eleventh Amendment "seems to limit the Supreme Court's power to review a case within its terms regardless of the court [state or federal] in which it is originally brought." D. Currie, *The Constitution in the Supreme Court, The First Hundred Years, 1789-1888* 424 n. 148 (1985). Indeed, in an appeal from a state court, this Court held that the action was in effect a suit against the state and therefore barred under the Court's Eleventh Amendment decisions. *Louisiana ex rel. The New York Guaranty and Indemnity Co. v. Steele*, 134 U.S. 230 (1890). The Court has never construed the Eleventh Amendment to the contrary.[9]

Supreme Court review. Unlike those cases, in *Cohens* "[n]othing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything." 19 U.S. (6 Wheat.) at 410; *see also id.* at 412. Indeed, at another point, Chief Justice Marshall seemed to agree that a citizen could not sue a state to recover taxes unconstitutionally levied on exports because there would be no constitutional right to such relief. 19 U.S. (6 Wheat.) at 402-03.

[9] In his dissent in *Atascadero*, 473 U.S. at 256 n.8, Justice Brennan stated that there is "a longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal *appellate* jurisdiction over suits from state courts" (emphasis in original). (Justice Brennan later argued against such a rule. *See* note 7 *supra*.) However, in none of the decisions cited to support that "unarticulated" proposition did the Court require a retroactive award of damages against a state or other relief that could not have been ordered by a federal district court under *Ex Parte Young*.

Three of the cases involved claims for refunds of unconstitutional state taxes, but the Court refrained from addressing the propriety of that remedy. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 277 (1984); *Williams* v. *Vermont*, 472 U.S. 14, 28 (1985); *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 14-15 (1983). Two of the cases involved easement or land-title disputes in which the decision had purely prospective effect and could have been accomplished through an order to state officers. *Summa Corp.* v. *California ex rel. State Lands Comm'n*, 466 U.S. 198 (1984) (easement claim); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) (land-title claim). Another case involved an individual's claim that he had unconstitutionally been

The Eleventh Amendment's bar against retroactive monetary awards does not render this Court powerless to preserve the supremacy and uniformity of federal law when it reviews state court decisions.[10] The Eleventh Amendment does not govern actions seeking to restrain the collection of allegedly unconstitutional state taxes. *See General Oil Co.* v. *Crain*, 209 U.S. 211, 225-228 (1908). If, for example, petitioners had sought and been denied a preliminary or permanent injunction in state court, the state officials would not have had a legitimate Eleventh Amendment objection to review by this Court. Apart

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disqualified from eligibility for unemployment compensation benefits. But in upholding his eligibility, the Court expressed no view about whether such benefits were to be paid retroactively. *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 719 (1981). In the final case cited by Justice Brennan, the Court sustained a state statute immunizing parole officers from liability for injuries caused by paroled or released prisoners. *Martinez* v. *California*, 444 U.S. 277, 279 (1980).

Justice Brennan did not mention the footnote in *Maine v. Thiboutot*, 448 U.S. 1, 3 n.7 (1980), which stated that "[n]o Eleventh Amendment question is present, of course, where an action is brought in state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'" The state had there invoked the Court's appellate jurisdiction to review a state court judgment awarding attorney's fees under 42 U.S.C. § 1988. To the extent that *Thiboutot* means simply that the Eleventh Amendment does not apply to state courts, it does not deal with the question here. That is how the Court itself interpreted the footnote in a decision handed down the same day. *Maher* v. *Gagne*, 448 U.S. 122, 130 n.12 (1980) ("[t]he Eleventh Amendment issue was not before the Court in *Thiboutot* because that case involved an award of fees by a state court pursuant to [42 U.S.C.] § 1988").

[10] In *Ex Parte Young*, 209 U.S. at 151, which rested on the need to preserve the uniformity and supremacy of federal law (*see Green* v. *Mansour*, 474 U.S. at 68; *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 104-105 (1984)(*Pennhurst II*)), the Court relied on *Poindexter* v. *Greenhow*, 114 U.S. 270 (1885), one of the *Virginia Coupon Cases*, which had created a similar doctrine for cases on appeal from state courts. *See also Hopkins* v. *Clemson Agric. College*, 221 U.S. 636 (1911), and cases there cited.

from the Tax Injunction Act (28 U.S.C. § 1341) and principles of comity,[11] a lower federal court could itself have issued an injunction if it had found the state tax law in violation of the Commerce Clause. This Court has no less power when it reviews state court judgments.

It is, however, another matter entirely when the Court is asked, as it is here, to reverse a state court decision refusing to make a retroactive monetary award that would have to be paid out of the state treasury. Regardless of the form of the Court's order reversing such a judgment or the identity of the state defendants, the effect would be the same as if any federal court had issued the directive.[12] In such cases, the Eleventh Amendment restricts the Court's judicial power under Article III to the same extent the Amendment restricts the lower federal courts' judicial power.

In so arguing, we rely on the Court's rulings that "the general criterion for determining when a suit is in fact against the sovereign [and thus barred by the Eleventh Amendment] is the effect of the relief sought." *Pennhurst II*, 465 U.S. at 107 (emphasis in original).[13] The Court therefore has refused to

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[11] *See Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981); *cf. Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 303, 304 n.15 (1952).

[12] It is of no consequence that the Court's mandate would issue to the state court and, therefore, arguably might not be viewed as an order "directly to a State" prohibited by the Eleventh Amendment. *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978). As we argue in the text, the Eleventh Amendment places the same constraints on this Court as the lower federal courts when the *effect* of its judgment is to require retroactive monetary relief.

[13] *See also Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949) (dictum) ("a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property").

extend the *Ex Parte Young* doctrine "to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States." *Pennhurst II*, 465 U.S. at 105. As the Court recognized in *Edelman* v. *Jordan*, 415 U.S. at 665, requiring such retroactive relief necessarily "'fall[s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.'"[14] These considerations fully apply regardless whether the judicial power requiring that relief is exercised by a lower federal court or by this Court in a case originating in state court.

None of what we have said is affected by petitioners' insistence that they should be awarded tax refunds in order to compensate them and to deter state legislatures from violating the Commerce Clause. We think both reasons are groundless (*see* pp. 32-41 *infra*), but whatever their merit they cannot alter the Eleventh Amendment's limitation on the judicial power to order the relief petitioners now demand. In *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), the Court held in the clearest possible terms that "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Accord Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). There is no reason why the Court should depart from that principle in this case.[15]

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[14] *Quoting Rothstein* v. *Wyman*, 467 F.2d 226, 237 (2d Cir. 1972) (McGowan, J., sitting by designation), *cert. denied*, 411 U.S. 921 (1973).

[15] Although petitioners cite several cases on appeal from state courts in which this Court addressed claims for refunds of unconstitutional state taxes, none of those cases supports the view that the Court's appellate jurisdiction is exempt from the Eleventh Amendment and some of the cases implicitly support the opposite view. In both *Ward* v. *Board of County Commissioners*, 253 U.S. 17 (1920), and *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), the Court ordered county officials to refund unconstitutional taxes the county had collected. However, the Eleventh Amendment was not implicated because it does not apply to counties. *E.g.*, *Edelman* v. *Jordan*, 415 U.S. at 667 n.12; *County of Lincoln* v. *Luning*, 133 U.S. 529, 530 (1890). Significantly, in *Ward* the Court ruled that the county "could not lessen its liability by paying over a portion of the money" to the state treasury when it knew of the taxpayers' claims. 253 U.S. at 24. This rationale would have been unnecessary had the Court believed that the Eleventh Amendment posed no bar to a refund order directed at the state itself. In *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), the Court reversed a state court judgment denying Indians a refund of state taxes and remanded "for further proceedings not inconsistent with this opinion." 280 U.S. at 369. The Eleventh Amendment was not implicated, however, because at the time of the decision the "federal instrumentality" doctrine treated Indians as instrumentalities of the federal government, and the Eleventh Amendment does not apply to suits between states and the federal government. *E.g.*, *Edelman* v. *Jordan*, 415 U.S. at 669; *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965); *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922), *overruled in Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938).

The short of the matter is that if the lower federal courts cannot, consistently with the Eleventh Amendment, order retroactive monetary relief, the same result cannot be achieved through this Court on review of state court decisions. The judicial power set forth in Article III is circumscribed in both situations. In neither is such relief necessary to maintain the uniformity and supremacy of federal law. *Edelman* v. *Jordan*, and the cases that have followed it, did not rest on the notion that the states would be offended by being subjected to orders from lower federal courts, but not the Supreme Court. Those decisions rested instead on the fundamental purpose of the Eleventh Amendment to prevent the federal judiciary from imposing financial liabilities on the states in citizen suits when the state courts would not allow such relief.

II. JUDICIAL ENFORCEMENT OF THE COMMERCE CLAUSE DOES NOT ENCOMPASS AWARDS OF TAX REFUNDS

Petitioners assume that since the HUE tax violated the Commerce Clause, they are entitled to tax refunds unless *Scheiner* is applied prospectively only. Operating on this assumption, they devote their entire Brief to the subject of retroactivity. Their approach, however, evades a critical sub-

sidiary question, namely whether the Court can enforce the Commerce Clause not only by striking down state tax statutes, but also by requiring the states to reimburse taxpayers for the taxes they paid while the statute was in effect.

That question is essentially one of remedy, as the Court recognized in *Tyler Pipe Industries* v. *Washington State Department of Revenue*, 107 S.Ct. 2810, 2822 (1987), and *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276-77 (1984). When state law precludes such a remedy, as it does in this case,[16] and when as here no federal statute is involved, petitioners must base their tax refund claim directly on the Constitution. Their discussion of retroactivity does not assist them in this respect. As the Court has held, the rules of retroactivity are not derived from any constitutional provision.[17] Indeed, petitioners implicitly acknowledge that their retroactivity arguments rest on no constitutional foundation; notably absent from their Brief is a section, required by Rule 34.1(f), setting forth the constitutional provisions involved.

To the extent petitioners address this matter, they simply assert that they were deprived of their "constitutional rights" and are entitled to refunds because the HUE tax violated the Commerce Clause (Pet. Br. 12, 13). But "[s]uch words as 'right' are a constant solicitation to fallacy" and that is certainly true with respect to petitioners' contentions. *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.). The Commerce Clause, by its terms, confers no constitutional rights of any sort on petitioners, much less a right to monetary relief. The text of Article I, § 8, cl. 3, grants power to *Congress* to regulate

[16] *See*, in addition to note 4 *supra*, the authorities collected in Brief for Intervenors in the Arkansas Supreme Court, at 3-4, 12-17.

[17] The Constitution "neither prohibits nor requires [that] retrospective effect" be given to any "new" constitutional rules. *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965). *See also Solem v. Stumes*, 465 U.S. 638, 642 (1984) ("retroactive application is not compelled, constitutionally or otherwise"); *United States v. Johnson*, 457 U.S. 537, 542 (1982); *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) (the "Federal constitution has no voice upon the subject" of retroactivity).

commerce among the several states. When the Court acts, as it did in *Scheiner*, to prevent the states from encroaching on Congress' prerogatives, it is acting "not to protect individual rights, but to further the national interest in an efficient economy." *Consolidated Freightways Corp.* v. *Kassel*, 730 F. 2d 1139, 1145 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984). *See also White Mountain Apache Tribe* v. *Williams*, 810 F.2d 844, 849 (9th Cir. 1987) *cert. denied*, 479 U.S. 1060, *reh. denied*, 480 U.S. 941 (1987) ("dormant Commerce Clause . . . has as its primary function the allocation of power between national and state governments"). "Throughout the Commerce Clause cases the emphasis is on the relationship between conflicting federal and state interests, not the relationship between the individual and the state." *Consolidated Freightways*, 730 F.2d at 1145. *See generally Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 440 (1978); *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537-39 (1949).

As a result, the Court, in its decisions interpreting the negative implications of the Commerce Clause, has assumed an essentially passive role, limited to determining what is forbidden to the states until Congress enters the area through legislation. *See Scheiner*, 107 S.Ct. at 2843 n.23 ("If Congress should disagree with this decision, it would, of course, have the power to authorize flat taxes of this kind."). Petitioners' argument that the Court should go further and require states to refund taxes when state tax laws are found to violate the Commerce Clause is not merely textually unsupportable. If accepted, it would thrust the Court into the role of regulating interstate commerce in a fashion inconsistent with congressional exercises of power in the area. Legislation of any sort, and particularly that regulating interstate commerce, is almost invariably forward looking.[18] If, for example, the *Aero May-*

[18] For example, when Congress invalidated certain state property taxes on motor carrier transportation equipment in the Motor Carrier Act of 1980, it did so prospectively only, despite its conclusion that such taxes "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11503a(b). Similarly, when Congress outlawed certain discriminatory state property taxes on railroads, it

flower rule had been adopted in a federal statute and then replaced with a statute embodying the *Scheiner* ruling, it is safe to assume the new legislation would govern only the future and would not provide refunds for taxes previously paid.[19] This is not only because "[r]etroactivity is not favored in the law" and is a power Congress rarely exercises. *Bowen* v. *Georgetown University Hospital*, 109 S.Ct. 468, 471 (1988); *id.* at 479 (Justice Scalia, concurring)("Retroactive legislation has always been looked upon with disfavor . . . ."). It is also because

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did so prospectively, allowing the states "a 3-year grace period . . . to bring their property taxation systems into compliance with the statutory requirements." *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 458 (1988).

While not legislating directly on the issue of flat highway taxes, Congress has not been entirely silent. The Motor Carrier Act specifically provided its restriction on certain property tax policies of states did not affect other taxation powers of states over motor carriers. 49 U.S.C. § 10521(b)(4) (the Act "does not . . . affect the taxation power of a state over a motor carrier"). The accompanying House Report disclaimed any intention that the Act's proscription would reach flat taxes such as those at issue here:

> The provisions of this section do not apply to that body of taxes known as highway user taxes that are levied on owners or operators of motor vehicles because of their use of public highways. These highway user taxes include, but are not limited to, motor fuel taxes, registration fees, drivers licenses, vehicle user taxes, ton-mile taxes, and other motor vehicle related taxes; the proceeds of these taxes, for the most part, are expended through a State highway fund or otherwise earmarked for highway construction, maintenance or operation.

H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 45 (1980).

[19] *See* Schaefer, *Prospective Rulings: Two Perspectives*, 1982 Sup. Ct. Rev. 1 (1983):

> Legislatures normally look forward. When a legislative body changes a rule of law, the new rule ordinarily governs only conduct that occurs after its enactment. If the effective date of a particular statute is to be deferred, the precise date is stated. . . . [I]n civil matters the constitutional prohibition against impairment of contracts, judicial rules of construction, principles of estoppel, and, ultimately, considerations of substantive due process combine to limit the retrospective application of statutes.

Congress is sensitive to the financial plight of the states and knows, as does this Court, that "taxation is indispensable to their existence." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824).

"The power to require readjustments for the past is drastic," *Brimstone R.R. & Canal Co.* v. *United States*, 276 U.S. 104, 122 (1928), and that is especially true when the readjustment would require a state to deplete its treasury in order to satisfy the demands of private parties who have reaped the benefit of state expenditures. An award of tax refunds would have to be satisfied out of current revenues, upon which the state depends for its day to day operations.[20] Such an award can threaten a state's financial security. When states prepare budgets regarding income and expenditures, they predicate their fiscal affairs on the proceeds from particular taxes. When tax revenues are expended, those "expenditures cannot be undone and reimbursement would have a substantial effect on the State's existing financial requirements. Public fiscal stability is at issue." *Salorio* v. *Glaser*, 93 N.J. 447, 461 A.2d 1100, 1110, *cert. denied*, 464 U.S. 993 (1983).

To require such relief in the name of the Commerce Clause would indeed be ironic. Arkansas' highway taxes are dedicated to the state's highway system. In order to pay petitioners the refunds they demand, whether a full $122 million or some lesser amount, petitioners propose a dramatic increase in taxes imposed on the users of the state's highways. (No one, including petitioners, suggests that the state should create a surplus by decreasing its expenditures on the highways.) Yet such increased taxes would themselves constitute a severe burden

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[20] *Compare* the decree in *Maryland* v. *Louisiana*, 452 U.S. 456, 457 (1981), ordering taxes on natural gas collected by Louisiana to be refunded when the taxes had been deposited in an escrow account pending a decision on the merits and the Federal Energy Regulatory Commission, in the exercise of the authority given it by Congress to regulate interstate commerce, had required that consumers, on whom the economic incidence of the tax fell, be given refunds. *Maryland* v. *Louisiana*, 451 U.S. 725, 737 n.13, 741 (1981).

on interstate commerce, which is why at least some class members intervened to protest the granting of refunds in this case.[21]

In sum, when a state tax law is struck down under the negative Commerce Clause, there is no constitutional right to a refund. Such relief is not of the sort Congress itself would have provided if it had regulated the subject. There is no constitutional basis for creating some national rule of tax refunds, administered by the state courts and, ultimately, this Court.[22] "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981). Unless and until Congress acts, the matter is therefore committed to state law. As the Court held in a related context, "whether or not the class member will receive [tax refunds] rests entirely with the State, its agencies, courts and legislature, not with the federal court." *Quern* v. *Jordan*, 440 U.S. at 348. *See Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 196-97 (1983).

III. EVEN IF THE *CHEVRON* STANDARDS FOR RETROACTIVITY APPLY, PETITIONERS' CLAIM FOR REFUNDS FAILS

As petitioners see it, *Scheiner* must be given retroactive effect to allow tax refunds because it fails to satisfy any of the three criteria for prospective-only treatment set forth in

[21] *See* Brief for Intervenors in the Arkansas Supreme Court, at 11-12.

[22] The area is complex. In some states recovery of refunds for taxes paid under a statute found to be invalid is regulated by statute. A survey of ten states revealed "a great diversity of statutory refund provisions." Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 125 (1987). In other states, recovery of tax refunds is governed by state common law, subject to the state's sovereign immunity. *Id.* at 120-125.

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106-07 (1971). We disagree for the reasons set forth below.

A. *Scheiner* Was A Clear Break With Past Precedent

The first *Chevron* criterion is straightforward: a "decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." *Id.* at 106.

Scheiner surely satisfies this criterion. As both the majority and dissenting opinions recognized, *Scheiner* directly overruled not merely one "clear past precedent," but many, including *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495 (1947); and *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285 (1935).[23]

In what Justice O'Connor called "an entirely novel enterprise," the majority in *Scheiner* created a test of "internal consistency" that state taxes must pass in order to be upheld under the Commerce Clause. 107 S. Ct. at 2850 (dissenting opinion). Before *Scheiner*, flat highway taxes were considered constitutionally valid so long as they were "moderate in amount," were used for the "upkeep of highways which the carriers must use in the doing of their business," and were imposed on interstate and intrastate "vehicles operated in like conditions." *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U.S. at 289. Although Pennsylvania's taxes satisfied each of those conditions, the Court in *Scheiner* found the taxes unconstitutional.

[23] *See Scheiner*, 107 S.Ct. at 2847 ("Thus, the precedents upholding flat taxes can no longer support the broad proposition . . . that every flat tax for the privilege of using a State's highways must be upheld even if it has a clearly discriminatory effect on commerce by reason of that commerce's interstate character."); *id.* at 2848 (Justice O'Connor, dissenting) ("the Court today directly overrules the holdings of at least three cases"); *id.* at 2851 (Justice Scalia, dissenting).

Scheiner thus established a new principle of law by overruling clear precedent. As we have said, that clearly meets the first *Chevron* criterion. Petitioners argue, however, that Supreme Court opinions delivered before 1983, when Arkansas enacted the HUE tax, made it a near certainty that the Court would rule as it did in *Scheiner*. *See, e.g.*, Pet. Brief, at 26 ("The handwriting was on the wall when Arkansas adopted the HUE tax in 1983, but the State chose not to read it."). But petitioners misstate the rule for determining when there has been a clear break in the law. *Chevron* held that this could occur in one of two ways: the decision *either* overruled a precedent or decided a question of first impression in a way not foreshadowed. Petitioners reformulate this into a requirement that the decision overruling precedents must not have been predictable; otherwise, they contend, no one could justifiably have relied on the previous rule. The Court has already rejected that formulation. *Solem* v. *Stumes*, 465 U.S. 638 (1984), a case petitioners ignore, held that although "[a] decision that overrules much-criticized precedent may well have been clearly foreshadowed . . . authorities are generally entitled to rely on existing case law, whatever its disrepute." 465 U.S. at 646 n.6.

In any event, petitioners' assertion that the Arkansas legislature should have prognosticated the fall of *Aero Mayflower* is scarcely worth serious attention. *Scheiner* was a five-to-four decision; cases in which the outcome is a foregone conclusion do not result in such a closely divided Court and they do not generate opinions of such length and complexity. *See Florida v. Long*, 108 S.Ct. 2354, 2361 (1988). Petitioners also suggest that *Scheiner* merely applied settled principles to the particular facts of the case. But the Court itself saw the matter quite differently. The majority in *Scheiner* thought that determining the validity of the Pennsylvania highway taxes was "by no means easy; the uneven course of decisions in this field reflects the difficulties of reconciling unrestricted access to the national market with each State's authority to collect its fair share of revenues from interstate commercial activity." 107 S. Ct. at 2832-33.

There is nothing to petitioners' further point that the Court's decisions in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), made it fairly certain that, when the occasion arose, the Court would strike down flat taxes of the sort challenged in *Scheiner*. *Complete Auto* did not give the Arkansas legislature—or anyone else for that matter—a clear warning that the *Aero Mayflower* line of cases was about to meet its doom. In 1978, after *Complete Auto* was decided, the Court sent a message that its flat highway tax decisions were alive and well.[24] Moreover, the actual holding of *Complete Auto* did not signal that the Court was about to depart from its earlier rulings. The Court there upheld a state sales tax and rejected the rule of *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951), that state taxes on interstate commerce are *per se* unconstitutional.

Commonwealth Edison, far from supporting petitioners' thesis, further undercuts it. The case involved the constitutionality of a state severance tax on coal. In applying the *Complete Auto* test, the Court thought it important that the severance tax was a general revenue measure rather than the kind of tax involved in this case. Thus, *Commonwealth Edison* "put to one side those cases in which the Court reviewed challenges to 'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. *See, e.g., Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939) . . . ." 453 U.S. at 621-22.[25] Having said this, the Court then dropped a footnote stating that such taxes "'cannot be tested by standards which generally determine the validity of taxes.'"[26] These statements

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[24] *See Massachusetts* v. *United States*, 435 U.S. 444, 463-64 (1978), *citing Capitol Greyhound Lines* and *Aero Mayflower II* with approval; *Scheiner*, 107 S.Ct. at 2848 (Justice O'Connor, dissenting).

[25] In *Evansville Vanderburgh Airport Auth. Dist.* v. *Delta Airlines*, 405 U.S. 707, 715-17 (1972), the Court also cited the *Aero Mayflower* cases with approval.

[26] 453 U.S. at 622 n.12, *quoting Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931).

would lead even the most astute observer to believe that the 1981 decision in *Commonwealth Edison* would not apply to flat highway taxes such as those Arkansas enacted two years later.

Moreover, the *Scheiner* decision itself did not rest on the analytical framework represented by *Complete Auto* and *Commonwealth Edison*. Instead, the Court used a test of "internal consistency"—a phrase the Court had never even uttered before 1983.[27] Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138 (1988). As applied to flat highway taxes, this constituted a new rule of law in Commerce Clause jurisprudence, which provoked not only the dissents in *Scheiner* and *Tyler Pipe Industries* v. *Washington State Department of Revenue*, 107 S.Ct. 2810 (1987), but also scholarly comment recognizing the novelty of the rule and predicting that it "may introduce confusion and uncertainty in an area of the law that has had more than its fair share of both." Hellerstein, 87 Mich. L. Rev. at 188.

B. Awards Of Refunds Will Not Further The Purposes of *Scheiner*

The second *Chevron* criterion requires the courts to examine the purpose and effect of the newly announced rule in order to determine "'whether retrospective operation will further or retard its operation.'" 404 U.S. at 107, *quoting Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965).

The purpose of the *Scheiner* "internal consistency" rule is, the Court stated, to prevent commerce among the States from being deterred. 107 S.Ct. at 2840. "Whether the full brunt, or only a major portion, of [the burden of flat highway taxes] is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial

[27] Petitioners, at one point in their Brief, acknowledge as much. Pet. Br. at 42 ("the internal consistency principle . . . was at the heart of the *Scheiner* decision"); *see also* p. 38 *infra*.

barrier around" the state. *Id.*[28] By ruling as it did, the Court removed this "financial barrier" in Pennsylvania. The state legislature did the same in Arkansas when it repealed the HUE tax.

Thus, the purpose of the *Scheiner* rule has been satisfied because the HUE tax no longer poses any threat to "the free movement of commerce." Tax refunds would not cure any threat that might have existed in the past and, in any event, the idea that the Arkansas tax had deterred interstate commerce is completely unfounded. Prior to 1983, trucks weighing over 73,280 pounds were not permitted to travel on the state's highways. When the state lifted its restriction on these heavy trucks and imposed the HUE tax to compensate for the damage they would cause, petitioners realized operational savings of $115 million per year, which more than offset the $26 million yearly burden of the HUE tax. J. App. 152; Rep. Br. App. C. Moreover, the common carriers among petitioners could pass the tax on to their customers and indicated that they would do so shortly after the tax became effective. J. App. 32. If despite these considerations the HUE tax deterred some truckers from entering Arkansas, giving tax refunds to petitioners is not a remedy. Truckers who did not travel Arkansas' highways are not among the class petitioners represent.

Petitioners' further argument that refunds are needed as a sanction against state legislative overreaching is totally unfounded. The Arkansas legislature acted responsibly when it enacted the HUE tax in 1983 and it acted responsibly when it repealed the statute in 1987 after *Scheiner* was announced. As we have discussed, the *Aero Mayflower* line of cases firmly supported the legislature's enactment of the statute. Petitioners' complaint that legislative repeal did not come soon

[28] As we discuss later, the purpose of *Scheiner* was *not*, as petitioners claim, to remove cost per mile differences among interstate carriers. Petitioners analogize the HUE tax to Pennsylvania's axle taxes, but in *Scheiner* the per mile cost of the axle taxes for Pennsylvania and non-Pennsylvania base registered trucks was the same. 107 S.Ct. at 2836.

enough fails to take into account the facts that the Arkansas legislature convenes in two-year intervals and was not then in session; that this Court, rather than reversing the Arkansas court's decision sustaining the tax, had sent the case back for reconsideration; that *Scheiner* was not an analytically simple decision; and that midstream legislative readjustments of a state's tax system are fraught with difficulties. In any event, the period between the decision in *Scheiner* and the legislature's repeal of the HUE tax—from June 1987 to October 1987—is almost precisely the same amount of time this Court accorded to Congress in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982), in order to allow legislative corrections.[29]

Petitioners also declaim the state courts and contend that refunds are needed in order to keep those courts in line. Pet. Br., at 29-30. What purpose of the negative Commerce Clause that would fulfill they do not explain. Still less can they prove that the Arkansas Supreme Court defied or thwarted any decision of this Court. By initially sustaining the HUE tax on the basis of the *Aero Mayflower* cases, the Arkansas court adhered to firmly established law. It could not have done otherwise. This Court retains the exclusive privilege of overruling its own decisions and until that occurs, the state courts are bound to follow them.

C. The Balance Of Equities Is Clearly Against Petitioners

The third *Chevron* criterion requires a weighing of the equities. 404 U.S. at 107. It is here that petitioners are on the weakest ground of all.

1. Petitioners, all of whom were subject to the HUE tax because of the gross weight of their trucks, consist of two classes: carriers whose vehicles were base registered in Arkansas and carriers whose vehicles were base registered outside

[29] The Court decided the case on June 28, 1982, but stayed the effective date of its judgment until October 4, 1982. 458 U.S. at 89.

Arkansas.[30] It is important to recognize that this distinction in classes, on the basis of the state in which trucks were base registered, is decidedly *not* a distinction between intrastate and interstate carriers[31] or between citizens of Arkansas and citizens of other states. The fact that a truck was base registered in Arkansas pursuant to the International Registration Plan necessarily means that it was engaged in *interstate* transportation. Where a truck was base registered, however, did not depend upon the carrier's state of incorporation or principal place of business. J. App. 80-81; R. 279, 437-39. Indeed, foreign corporations base registered their trucks in Arkansas and thus are among the class of Arkansas based carriers. R. 2128-29.

When petitioners complain that, as a result of the flat HUE tax, non-Arkansas base registered "truckers paid more than three times as much tax per mile as the Arkansas-based truckers did" (Pet. Br., at 39),[32] they are *not* complaining that

[30] Under the International Registration Plan ("IRP") (*see Scheiner*, 107 S.Ct. at 2834), a fleet of vehicles may be registered in a single state, which will then issue the only required plate for the vehicle. Interstate carriers report their mileage under the IRP. *Id.* The amount of the registration fee a truck pays in a state is equal to the percentage of the total miles a truck travels within the state. *Id.* If a truck logged 25 percent of its total miles in Arkansas, for example, it would pay 25 percent of Arkansas' registration fee. The state in which the vehicle is base registered is irrelevant to that calculation.

[31] Under the IRP, apportionable vehicles are those which are engaged in transportation across state lines. Jones Truck Lines, Inc., for instance, was a named plaintiff and is a petitioner in this Court. Pet. iii. Jones, a member of the Arkansas-based class, is headquartered in Arkansas. With 362 trucks, it has authority to haul in 48 states; approximately 77 percent of its total mileage is logged outside Arkansas. J. App. 29-30. (Whether Jones is now seeking HUE tax refunds is not clear. *See* pp. 7-8 *supra*.)

[32] Petitioners' 3-1 figure is based on a survey done by them in the early stages of this litigation; it has not been the subject of findings of fact; and it does not cover tax years after 1983. Thus, even if the survey were accepted, it is not known whether non-Arkansas base registered truckers traveled fewer miles in the state than their Arkansas based counterparts from 1983 to 1987 and therefore paid more per mile in HUE taxes.

intrastate commerce has been favored over interstate commerce.[33] Their grievance is merely that some interstate carriers—that is, some petitioners—had a heavier burden in terms of cost per mile from the HUE tax than other interstate carriers, who are also petitioners in this case.[34] What they refer to as the "discrimination component" (Pet. Br., at 39) represents a distinction *among* interstate carriers.

Unlike the situation in *Scheiner*, whether a truck was base registered in Arkansas or elsewhere had no effect whatever on the total amount of Arkansas registration fees paid for that truck, the cost per mile of such registration fees, the total amount of the HUE tax paid for the truck or the cost per mile of the tax.[35] In terms of these fees and taxes, it was of no financial consequence to Arkansas or to the carriers whether a truck

[33] To what extent interstate carriers paid more per mile than intrastate carriers is unknown and perhaps unknowable. In order to make that calculation, one would have to know the amount of Arkansas mileage logged by intrastate carriers who paid the HUE tax from 1983 to 1987. But intrastate carriers do not report their mileage. R. 1597-1598.

[34] In the Arkansas Supreme Court, the Arkansas Poultry Federation, as intervenors who were Arkansas-based truckers that paid the HUE tax, stressed that they sought no refunds; Leon Cawood, a named petitioner here, contended that he was the class representative of all Arkansas based truckers. Although Cawood also did not seek HUE tax refunds, he and his class claimed they were entitled to recover all retaliatory taxes imposed on them by other states when they engaged in interstate transportation. *See* pp. 7-8 *supra*.

[35] It is of course true that the more miles a truck logged in Arkansas after the $175 flat tax was paid for the year, the less the cost of the tax per mile would be. But such cost-per-mile differences will show up whenever interstate carriers travel different numbers of miles in Arkansas regardless of where they are base registered. (It is not necessarily true that a truck will travel more miles in the states in which it is base registered; that was not, for example, the situation in *Scheiner*. *See* note 36 *infra*.)

was based registered in Arkansas or elsewhere.[36] When petitioners seek to remedy an alleged average three-to-one cost per mile disparity (*see* note 3 *supra*), they are seeking a readjustment among themselves financed through the Arkansas treasury. If, according to their lights, some petitioners paid too much per mile then other petitioners necessarily paid too little. But the total amount of HUE taxes paid by these interstate carriers—the total burden on interstate commerce, which Arkansas spent to keep the state's highways in good repair—was far from excessive.

Indeed, much of the disparity among petitioners in HUE tax costs per mile was offset through registration fees. While Arkansas base registered trucks averaged $.0260 per mile in registration fees, non-Arkansas base registered trucks averaged less than half that amount, or $.0110 per mile.[37] J. App.

[36] With respect to trucks subject to the Pennsylvania axle taxes at issue in *Scheiner*, Pennsylvania base registered trucks traveled "approximately the same number of miles on Pennsylvania's highways" as non-Pennsylvania based trucks. 107 S.Ct. at 2836. Thus, the costs per mile of the axle tax were the same for both classes. Petitioners are incorrect when they state that the Pennsylvania axle taxes had "actual discriminatory impacts, costing typical out-of-state truckers many times as much per mile of operation within the state as they cost in-state truckers." Pet. Br. at 42. The Court's mention in *Scheiner* of actual discrimination at a rate of five to one did not refer to the axle taxes. 107 S.Ct. at 2836 & n.9, 2841. It was aimed at Pennsylvania's $25 marker fee, which applied to all trucks traveling in the state weighing more than 17,000 pounds *except* those registered in Pennsylvania. *Id.* at 2835.

In enacting the axle taxes, Pennsylvania also reduced registration fees for Pennsylvania base registered trucks by the amount of the axle taxes. *Id.* at 2842.

[37] Under the International Registration Plan, of which Arkansas is a member, registration fees are apportioned. *See Scheiner*, 107 S.Ct. at 2834 ("The total fee payable to each State is the product of each State's total fee for full registration of each vehicle and that State's percentage share of the vehicle's mileage."). When Pennsylvania passed axle taxes amounting to $180 per year for the heaviest vehi-

154. The same factor that made the foreign-based truckers' cost per mile greater with respect to the HUE tax—less mileage in Arkansas than their Arkansas based counterparts—coupled with their greater out-of-state mileage, resulted in their paying less per mile in registration fees.[38]

Moreover, if differences in cost per mile in registration fees among interstate carriers are not inequitable or unconstitutional, as *Scheiner* indicated (107 S.Ct. at 2840), differences in cost per mile in HUE taxes were not inequitable. The HUE tax ran afoul of the Commerce Clause for another reason entirely—it could not pass *Scheiner*'s internal consistency test. *See* Pet. Br. at 42; note 27 *supra*. Petitioners' proposed measure of relief—the "discrimination component" among interstate carriers—is unrelated to that test. The nature of their proposed remedy does not, in short, correspond with the nature of the violation.

2. Petitioners cannot reasonably contend that they did not receive substantial benefits from the state during the years in question or that the amount of HUE taxes they paid was out of proportion to those benefits. As we have developed earlier, when Arkansas removed its restriction on trucks with gross weights of more than 73,280 pounds and enacted the HUE tax in order to finance the costs associated with having such heavy trucks on its highways, petitioners saved $115 million per year.

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cles, it reduced its registration fees by the same amount. 107 S.Ct. at 2835. Arkansas did not, however, do the same when it enacted the HUE tax. The upshot is that in Arkansas, when in-state trucks ran up a greater percentage share of their total mileage on Arkansas highways than their foreign-based counterparts, they incurred a much higher cost per mile in such fees.

[38] To illustrate, suppose an Arkansas based truck logged 25,000 of its total of 50,000 miles in the state while a non-Arkansas based truck logged 25,000 miles in Arkansas and 75,000 miles outside the state. For the Arkansas truck the cost would be one-half of Arkansas' $1044 registration fee. J. App. 64. The non-Arkansas based truck, despite traveling the same number of miles in the state, would be registered with a payment of only 25 percent of the fee; its cost per mile, in other words, would be 50 percent less than the cost per mile for the Arkansas based truck.

J. App. 152. Unloaded five-axle trucks weigh between 28,000 and 31,0000 pounds. R. 2308. Carrying loads that would bring the trucks up to a gross weight of 80,000 pounds was more profitable for the truckers and, beginning in 1983, they no longer had to circumnavigate the state in order to do so. From that point on these petitioners inflicted damage to Arkansas's highways of $53 million per year while paying far less than that in HUE taxes.[39] At the same time, the regulated carriers among petitioners could and apparently did pass the Arkansas taxes on to their customers through tariffs filed with the Interstate Commerce Commission. J. App. 32.[40] And it was contended that other carriers among petitioners passed their HUE taxes on to the owner-operators who leased their services and equipment to them. *See* p. 8 *supra*.

3. In the circumstances of this case, the administrative burden associated with giving tax refunds on any fair basis would be intolerable. During the period in question, approximately 220,000 trucks qualified each year by paying either the $175 annual fee or the $.05 per mile charge. Also, in each year approximately 300,000 trip permits were purchased. Rep. Br. App. C. To what extent any particular non-Arkansas based truck paid more per mile in HUE taxes than the average paid by his Arkansas-based counterparts for any year has never been established. The difference—if any—between the cost per mile in HUE taxes paid by intrastate carriers and interstate carriers is unknown and likely unknowable at this point.[41]

At all events, with more than 220,000 trucks having qualified by paying one form or another of the HUE tax each year, the difficulties in reconstructing what in fact occurred and in determining where the economic incidence of the tax on any par-

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[39] As discussed earlier, geography alone contributes to higher maintenance costs related to higher weight vehicles in Arkansas and other Mississippi Valley states than in other states. *See* note 1 *supra*.

[40] The record does not, however, show how many regulated carriers were within the class certified by the state court or the amount of taxes they passed on.

[41] *See* note 33 *supra*.

ticular truck fell would be enormous. Similar administrative burdens could, the Court indicated in *Scheiner*, be of such significance that even flat taxes might be sustained. 107 S.Ct. at 2847. *See Goldberg* v. *Sweet*, 109 S.Ct. 582, 590-91 (1989). It is no answer to suggest, as petitioners do, that the state could avoid such problems by simply providing each non-Arkansas based member of petitioners' class full refunds of all HUE taxes they paid. Relief along those lines would give one group of petitioners the financial benefits of using the state's highways for four years while shouldering none of the burdens their traffic caused. It would also mean that only the Arkansas-based truckers would have paid their way, a circumstance that could give rise to a reasonable claim on their part that the remedy discriminated against them. A dispute among petitioners along those very lines erupted in the Arkansas Supreme Court on remand. *See* p. 8 *supra*.

4. In all of this, petitioners blithely assume that increasing Arkansas tax rates on trucks can easily create a fund out of which they (or some of them) can be paid refunds. Pet. Br. 37. In the first place, if Arkansas raised its highway taxes to that extent, this could easily deter interstate carriers from entering the state. The proposed remedy thus would inflict damage on interstate commerce. Second, whether it is possible or prudent to increase highway taxes is a question courts are simply incapable of evaluating. Determining the effects on the Arkansas economy from increasing the total amount of state highway fees and taxes for such purposes is a legislative task and an extremely difficult one. Where the ultimate burden of increased taxes will fall depends on market structure and how prices are determined. Legislatures take into account not merely the legal incidence of the tax but also "the economic incidence which ensues after the system has adjusted to the imposition of the tax. This, to say the least, is no simple task, even for the economist who may be called upon to advise what the final incidence of particular taxes will be." R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 251 (4th ed. 1984).

For its part, Arkansas "had every reason to rely upon the settled understanding that flat highway taxes reasonably

related to the extent of the benefit conferred do not violate the Commerce Clause." *Scheiner*, 107 S.Ct. at 2849 (Justice O'Connor, dissenting). In planning expenditures and structuring its highway program, the state necessarily formulated its budget by relying on HUE tax collections. *See* R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice* 192 (highway expenditures "are a dominant factor in state budgets"). The proceeds of the HUE tax have been spent on highway improvements, maintenance and administration of the program. Contracts were let and matching federal highway funds were received and expended. J. App. 34-37. None of that can be undone. For their part, petitioners have reaped hundreds of millions of dollars in financial benefits and imposed costs on the state of $53 million dollars per year. The HUE tax is no longer being imposed and petitioners are entitled to no further relief in the form of tax refunds.

IV. HUE TAXES COLLECTED PRIOR TO THE ESCROW ORDER SHOULD NOT BE REFUNDED

Petitioners argue that whatever the merits of their retroactivity arguments in general, they are at least entitled to refunds for the period between June 23, 1987, when *Scheiner* was announced, and August 14, 1987, when Circuit Justice Blackmun issued the escrow order.

This case was before the Court when it decided *Scheiner*. However, rather than reversing the decision of the Arkansas Supreme Court sustaining the HUE tax, the Court vacated the judgment, "remanded . . . for further consideration in light of" *Scheiner* (Pet. App. 16a), and issued its mandate on July 16, 1987. Pet. App. 10a. The Court's action necessarily meant that the HUE tax continued in effect at least until the state court concluded its deliberations. During that period those responsible for administering the HUE tax had no other choice than to enforce it, as they did.

When *Scheiner* came down, the Arkansas legislature was not in session, the Arkansas Supreme Court was about to recess for the summer, the new HUE tax year was to begin in only a few days, and tens of thousands of trucks were waiting to

qualify to travel the state's highways with heavy loads by paying the tax for the July 1, 1987—June 30, 1987, tax year. In the Arkansas courts, petitioners had been arguing that the HUE tax was discriminatory in light of their survey showing that, on average, Arkansas-based carriers traveled more miles in the state than non-Arkansas-based carriers. The survey, however, was several years old and had never been found to be accurate. *See* note 3 *supra*. When this Court ordered the case remanded after *Scheiner*, it was therefore far from certain whether a further evidentiary hearing would be needed. If *Scheiner* were thought to rest on cost-per-mile differences resulting from a flat tax, findings of fact would be needed; whether such differences existed in Arkansas[42] would depend upon the relative number of miles traveled each year the HUE tax was in effect.

If the Arkansas officials, in the absence of any judicial decision declaring the HUE tax invalid, had refused to collect HUE tax payments, the consequence would have been a ban on all trucks over 73,280 pounds from Arkansas highways until the court or the legislature acted. (Use of the highways of Arkansas by these heavy trucks was conditioned on the payment of the HUE tax.) Legislative action would have been necessary even if a court found the HUE tax invalid; the HUE tax would have to be replaced with another tax compensating the state for the costs associated with the heavy trucks.

The Court's decision to vacate and remand the case instead of reversing the Arkansas Supreme Court not only allowed the state court time to reconsider its ruling sustaining the tax, but also properly accorded the state legislature time to reassess its tax structure in light of *Scheiner* and to formulate a new system if necessary, as it did. Meeting in Special Session, the Arkansas legislature repealed the HUE tax on October 9, 1987, and replaced it with new taxes on trucks weighing more that 73,280 pounds; these taxes, like the HUE tax, were designed as "compensation for the use of the highways of the state." Ark. Code Ann. § 27-35-205(b)(1) (Supp. 1987) (set forth in Rep. Br. App., at D-1, D-3). Those carriers who had already paid the

[42] They did not in Pennsylvania. *See* note 36 *supra*.

HUE tax for the 1987-88 year, were exempted from the newly-enacted tax for that year. Ark. Code Ann. § 27-35-204 (Supp. 1987) (Rep. Br. App. D-1).

Even if this Court, rather than vacating and remanding, had reversed the Arkansas Supreme Court's judgment, it would have been proper for the Court to give the state legislature some reasonable time to implement a new tax structure. The Court has allowed Congress a reasonable period within which to take account of its decisions striking down federal legislation and to enact substitute legislation. When the Court announced *Northern Pipeline* on June 28, 1982, for example, it stayed the effective date of its order until October 4, 1982, in order to afford Congress an opportunity to enact corrective legislation. 458 U.S. at 88-89. *See also Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976). Nearly the same amount of time transpired here between judicial decision and legislative response. The Arkansas legislature deserved the same consideration given Congress, particularly since this case involves a readjustment to the state's taxing system. Congress itself has recognized as much. When Congress enacted legislation banning certain state taxes on railroads because they constituted burdens on interstate commerce, it granted the states "a 3-year grace period . . . to bring their property taxation systems into compliance with the statutory requirements." *Burlington Northern R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 458 (1988).[43]

[43] Congress has recognized that the problems arising out of state taxation and regulation of interstate motor carriers are not readily solved. Section 3(b) of the Motor Carrier Act provided for five years of oversight hearings to monitor the effects of the legislative changes. 49 U.S.C. § 10101. Section 19 of the Act directed the Secretary of Transportation and the Interstate Commerce Commission "in consultation with the States . . . to develop legislative or other recommendations to provide a more efficient and equitable system of State regulations for interstate motor carriers." Since that time, Congress (with the Executive Branch, the states and industry representatives) has continued to examine carefully the issues surrounding state taxation and regulation of motor carriers. *See, e.g., Oversight of the*

In the state courts also, the effective date of decisions has been delayed when administrative difficulties or fiscal hardship would follow from giving the ruling immediate prospective effect.[44] In *Salorio* v. *Glaser*, the court announced its opinion striking down New Jersey's commuter tax on June 8, 1983, but permitted the state to continue collecting the tax until December 31, 1983. New Jersey, like Arkansas, had justifiably relied on the validity of its tax "for many years in preparation of budgets, with respect to both income and expenditures, and in making appropriations and expenditures. The expenditures cannot be undone and reimbursement would have a substantial effect on the State's existing financial requirements." 461 A.2d at 1110. New Jersey's fiscal year ended on June 30th; in this case, the HUE tax period expired on the same date and petitioners were required to pay the HUE tax for the 1987-1988 tax year in order to travel Arkansas' highways with their heavy trucks. *Salorio*, like *Scheiner*, was decided in June and as the court recognized, "[g]iven today's budgetary constraints, the competing interests for funds for many worthwhile purposes, and the difficulty in enacting additional taxes, it is unrealistic to expect that the Legislature and Executive will reasonably

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Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation, 98th Cong., 1st Sess. (1983); *Surface Transportation Issues: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. (1984) *("Surface Transportation Issues")*.

But, to date, Congress has not seen fit to legislate in this area and federal action has been deferred while the National Governors' Association attempts to develop standards for state taxation of motor carriers. *Surface Transportation Issues* at 1201-13, 1319-22, 1327-28. *See also Scheiner*, 107 S. Ct. at 2849 (Justice O'Connor, dissenting).

[44] *See Salorio* v. *Glaser*, 93 N.J. 447, 467-468, 461 A.2d 1100, 1111, *cert. denied*, 464 U.S. 993 (1983); *Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 14, 332 N.E.2d 279, 287, 371 N.Y.S.2d 388, 399 (1975), *modified*, 39 N.Y.2d 920, 352 N.E.2d 593, 386 N.Y.S.2d 406 (1976); *Soo Line R. Co.* v. *State Board of Equalization*, 286 N.W.2d 459, 468 (N.D. 1979); *Bond v. Burrows*, 108 Wash.2d 153, 164, 690 P.2d 1168, 1174 (1984).

be able to resolve the best method of dealing with the anticipated loss [by the end of the fiscal year]. . . . The State should be afforded a reasonable period of time to devise alternative revenue raising methods, abandon or postpone transportation projects or consider some other suitable solutions." 461 A.2d at 1110-1111.

For these reasons and those stated in the previous section of this Brief, the fact that Arkansas collected the HUE tax for several weeks after *Scheiner* and used those revenues for ongoing highway projects, without having a definitive judicial decision that the tax was unlawful, does not entitle petitioners to recover refunds from the state treasury for taxes paid before Circuit Justice Blackmun issued the escrow order.

CONCLUSION

For the foregoing reasons, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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